

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE)
CREATION OF THE JORDAN)
CREEK WATER DISTRICT,)
ADMINISTRATIVE BASIN NO. 55)

**ORDER ON RECONSIDERATION;
AMENDED FINAL ORDER
CREATING WATER DISTRICT 55B,
JORDAN CREEK**

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) is required by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 vests the Director with discretion to determine how these mandatory water districts should be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.*

On January 4, 2022, the Department received a formal request from the Gusman Livestock Company, Inc. (“Gusman Livestock”) for the creation of a water district for Jordan Creek and its tributaries.

On February 23, 2022, the Director of the Department conducted a public hearing concerning the proposed water district creation.

On April 12, 2022, the Director issued a Final Order Creating Water District 55B.

On April 26, 2022, Robert Joshua Bruce (“Bruce”) and Kershner Ranch LLC (“Kershner”) filed petitions for reconsideration.

ISSUES RAISED IN PETITIONS FOR RECONSIDERATION

Bruce Issues

Bruce requested that the Director reconsider forming Water District 55B for the following reasons:

1. The 06 Ranch and Gusman Livestock were given water rights for more water than “even exists in Jordan Creek.” Bruce also asserts that “the [water] district” is the entity that “gives more water then (sic) even exists in Jordan Creek.”

2. “Should all acres be accounted for that have claims to water rights?”

3. “No data has been collected to determine if enough water in Jordan Creek has or hasn’t been delivered to Gusman Livestock. More users say water has been sent down the creek then (sic) users that say water hasn’t been.”

4. “Several people have claimed that they have not received any information on meetings or final order letter.” Was the Department’s notice of the proposal to form the water district, the public meeting, and the order creating Water District 55B, Jordan Creek sufficient?

5. Bruce also alternatively proposed that the Department “delay formation of [the] district,” and select five locations to measure flows of Jordan Creek for five years. After water is measured for five years, the data could be analyzed to determine whether a district should be formed, and whether “senior water right holders have an inappropriate amount of water allocated to their property.”

Kershner Issues

Kershner requested that the Director reconsider forming Water District 55B, Jordan Creek, for the following reasons:

1. There is a “lack of data backing up senior water right’s holder Gusman Livestock.”

2. Installing and maintaining a water district is not “economically feasible.”

3. Forming and operating a water district would be an exercise in “futility.”

4. Kershner also alternatively proposes “maintain[ing] weirs in lieu of formation of a water district to collect sufficient data” for “a period of five years (or so) . . .” After the data is gathered and analyzed, the Department can decide “whether or not [water users with water rights authorizing diversion from Jordan Creek and its tributaries should] be in a water district.”

ANALYSIS OF ISSUES

Bruce and Kershner raise similar issues, paraphrased as follows:

1. Does Gusman Livestock own water rights for water in excess of the quantity to which it should be entitled?

2. There is no measurement of the quantity of water diverted by Gusman Livestock.

3. The state, some other entity, or the collective water users should engage in a water data gathering effort for five years in lieu of forming a water district.

The joint issues raised above will be addressed first in this order. Remaining individual issues will be addressed later.

Joint Issues

Water Right Entitlement

The Snake River Basin Adjudication (“SRBA”) determined the water rights for water users diverting from Jordan Creek and its tributaries. As stated in the previous order, the SRBA Court issued its Final Unified Decree on August 25, 2014, decreeing all water rights except for deferrable domestic and stockwater rights and certain other water rights not required to be claimed in the adjudication.

The Director of the Department does not have the authority to redetermine, or re-adjudicate, these water rights. *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The Director has the authority to administer decreed, licensed, permitted, and some beneficial use water rights by forming water districts. Idaho Code §§ 42-602, 42-607.

Water rights are defined by the measure of beneficial use. Once a water district is formed and a watermaster is delivering water to holders of water rights, the Department and the watermaster can jointly analyze whether water is being beneficially used or wasted.

Measurement of Diversions

A primary function of a water district is measuring water diverted and limiting the diversion to the quantities of water authorized by the water right. The assertion that Gusman Livestock’s diversion has not been measured, and presumably most, if not all, diversions from Jordan Creek have not been measured, is factual support for creation of a water district, and is not an argument against creation.

Measurement and Data Collection Responsibility

A water district is the organization prescribed by Idaho law to measure diversions, measure stream flows, and analyze the data for the purpose of delivering water in times of shortage. In a water district, the water users within the district can be required to install the necessary measuring devices and to self-fund a watermaster. Idaho Code §§ 42-701, 42-608. Noncompliance can result in penalties, including curtailment of water diversion.

The petitioners’ proposals that water data be gathered outside the structure of a water district does not identify a mechanism for mandating compliance with the measuring, reporting, and data analysis. The creation of a water district will promote the activities suggested by the petitioners.

Remaining Kershner Issues

Economic Feasibility & Futility

The Department has created myriad water districts statewide, both large and small. The water districts operate by initiative of water users holding water rights within the district. Each water district is unique because of variations in hydrology, water rights, and economics. The operation of a water district for Jordan Creek can be uniquely tailored to these factors to ensure the water delivery is economically feasible and not futile.

Remaining Bruce Issues

Acreage

The beneficial use of water must be limited to the place of use identified by the water rights. Monitoring of places of use is a proper function of the watermaster in a water district.

Adequacy of Notice

Bruce asserts that some holders of water rights in the Jordan Creek Hydrologic Basin did not receive “any information on meetings or final order letter.”

Idaho Code § 42-604 states, in pertinent part:

Before entering an order creating . . . a [water] district, the director shall, by regular mail, send notice of the proposed action to each water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment of the action will be accepted. The hearing shall not be held sooner than ten (10) days after the mailing of the notice, and the written comment period shall not close sooner than ten (10) days after the hearing.

Quoting the Final Order Creating Water District 55B, paragraph no. 7 under the heading “PRELIMINARY ACTIVITIES AND PROCEDURAL FACTS”:

7. On February 1, 2022, the Director issued a notice proposing creation of a water district for Jordan Creek and its tributaries pursuant to the provisions of Idaho Code § 42-604. The Department sent notice by regular U.S. Mail on February 2, 2022, to each holder of a surface water right in the Jordan Creek Hydrologic Basin, except domestic and stock water rights, as defined under Idaho Code §§ 42-111 and 42-1401A(11).

Department staff compared the list of water rights and associated water right holders in the Jordan Creek Hydrologic Basin to the list of water rights and water right holders in the basin who received notice of the proposal to create Water District 55B as required by Idaho Code § 42-604. The Director determined that some holders of water rights for de minimis instream stockwater rights¹ did not receive mailed notice that the de minimis instream stockwater rights would be included in the water district. Most of the holders of the de minimis instream stockwater rights hold water rights for other purposes and received notice of the proposed water district creation. Nonetheless, a handful of water users who hold only de minimis instream stockwater rights did not receive notice. These water right holders were entitled to notice to satisfy required due process.

¹ Instream stockwater rights are those rights authorizing the drinking of water by livestock directly from a natural stream. These rights are generally exercised without the use of any constructed physical diversion works (except as such works are authorized by Idaho Code 42-113(3)). These rights are described with points of diversion that identify a beginning and ending point of a stream reach for stock watering. De minimis instream stockwater rights are those instream stockwater rights where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

Because all holders of de minimis instream stockwater rights did not receive required notice, de minimis instream stockwater rights will not be included in Water District 55B. All other surface water rights in the Jordan Creek Hydrologic Basin will be included in Water District 55B.

Paragraph no. 7 under the heading “PRELIMINARY ACTIVITIES AND PROCEDURAL FACTS” will be amended to read as follows:

7. On February 1, 2022, the Director issued a notice proposing creation of a water district for Jordan Creek and its tributaries pursuant to the provisions of Idaho Code § 42-604. The Department sent notice by regular U.S. Mail on February 2, 2022, to each holder of a surface water right in the Jordan Creek Hydrologic Basin, except de minimis instream stockwater rights. The hearing notice described the proposed creation of a water district in the Jordan Creek Hydrologic Basin as shown on the map in Attachment A of this order, the reasons therefore, and the time and place for a hearing to be held on February 23, 2022, concerning the proposed action. The notice also designated a time period within which written comments on the proposed action would be accepted.

The Final Order Creating Water District 55B contained the following language in the “ORDER” portion of the document:

2. Surface water rights for domestic and stock water purposes, as defined by Idaho Code §§ 42-111 and 42-1401A (11), are presumed to be de minimis, and will not be regulated by the watermaster of Water District No. 55B to supply water to other water rights unless determined to be depleting water delivered to the holder of a senior priority water right. Nonetheless, the holder of a decreed surface water right for domestic and stock water purposes, as defined by Idaho Code §§ 42-111 and 42-1401A (11), may call for delivery of water against holders of junior priority water rights.

Because holders of surface water rights for de minimis instream stock water purposes were not served with notice of the proposed creation of a water district in the Jordan Creek Hydrologic Basin, and did not receive notice of the public meeting, only de minimis instream stockwater rights should have been fully excluded from the water district. Paragraph two of the “ORDER” shall be changed to the following:

2. Surface water rights for de minimis instream stockwater purposes are excluded from the water district and will not be regulated by the watermaster of Water District No. 55B.

Because of extra time needed to address the petitions for reconsideration, the time for holding an annual water district meeting will be changed to June 2022.

The remainder of the original Final Order Creating Water District 55B is reaffirmed and printed below, with amendments regarding de minimis stockwater rights as explained above.

PRELIMINARY ACTIVITIES AND PROCEDURAL FACTS

1. Jordan Creek is located in the Department's Administrative Basin 55, Owyhee County.
2. On December 1, 2011, the Snake River Basin Adjudication ("SRBA") District Court closed claims taking in Basin 55, Owyhee County.
3. On August 25, 2014, the SRBA District Court issued its Final Unified Decree, finalizing the judicial determination of water rights in the Snake River Basin, except for deferrable domestic and stockwater rights and certain other water rights not required to be claimed in the adjudication.
4. Water rights authorizing the diversion of water from Jordan Creek and its tributaries were decreed by the Final Unified Decree.
5. Idaho Code § 42-604 states that the Director shall "divide the state into water districts in such manner that each public stream and tributaries [(hydrologic basin)] . . . shall constitute a water district . . ." Division of the state into water districts and constitution of a water district requires the Director to "create" a water district. The mandate to create water districts "shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts . . ." *Id.*
6. On January 4, 2022, the Department received a formal request from the Gusman Livestock Company, Inc. ("Gusman Livestock"), for the creation of a water district for Jordan Creek and its tributaries as per Idaho Code § 42-604.
7. On February 1, 2022, the Director issued a notice proposing creation of a water district for Jordan Creek and its tributaries pursuant to the provisions of Idaho Code § 42-604. The Department sent notice by regular U.S. Mail on February 2, 2022, to each holder of a surface water right in the Jordan Creek Hydrologic Basin, except de minimis instream stockwater rights. The hearing notice described the proposed creation of a water district in the Jordan Creek Hydrologic Basin as shown on the map in Attachment A of this order, the reasons therefore, and the time and place for a hearing to be held on February 23, 2022, concerning the proposed action. The notice also designated a time period within which written comments on the proposed action would be accepted.
8. The Director's notice further explained that creation of the water district is necessary to properly administer water rights within the Jordan Creek Hydrologic Basin and to facilitate the measurement and reporting of water diversions.
9. On February 23, 2022, commencing at approximately 6:00 p.m. at the Pleasant Valley School, 28026 Juniper Mountain Road, located in Idaho near Jordan Valley, Oregon, Gary Spackman, Director of the Department ("Director"), conducted a public hearing concerning the proposed water district creation. Approximately a dozen people attended the hearing.

10. The Director initiated the meeting by explaining the hearing process. Department staff presented information that described the proposed district area, the features and operation of a water district, the reasons for creation of the district, and the rights and uses proposed to be included in the district. Reasons given for creation of the water district by the Department included the following:

- Administer and deliver water rights as necessary in accordance with the prior appropriation doctrine as established by Idaho law;
- Measure, record, and monitor water diversions as necessary to deliver priority water rights and to assure that diversions do not exceed authorized water right diversion limits; and
- Facilitate management of water rights. Water district operations and procedures provide a means to assist in maintenance of water right ownership records, maintain water right descriptions such as points of diversion and places of use, and provide watermaster review and comments for water right transfers, water supply bank transactions and potential new water right applications.

11. Following the presentation, the Director allotted time for hearing participants to ask questions regarding the proposed water district.

12. Persons attending the hearing offered oral statements for the record. In addition, the Director held the record open through March 9, 2022.

13. The following individuals presented oral statements for the record at the hearing:

- Laura Schroeder, Attorney for Gusman Livestock
- Teo Mastrejuan
- Josh Bruce
- Lavar Young
- Mike Hanley
- Bryce Kershner
- Kim Kildew
- Brian Johnstone
- Vernon Kershner

14. The following individuals submitted written comment to the Department on or before the March 9, 2022, deadline:

- Dennis Stanford (O6 Livestock)
- Teo Mastrejuan
- Josh Bruce (Bruce Ranch LLC)
- Craig Brasher
- Bryce Kershner (Kershner Ranch LLC)
- Kim Kildew (Boulder Creek Ranch LLC)
- Forest Fretwell (Gusman Livestock)

FINDINGS OF FACT

1. The Jordan Creek Hydrologic Basin, including its tributaries, is depicted on the map attached as Attachment A. The Jordan Creek Hydrologic Basin drains approximately 500 square miles of land in Owyhee County, Idaho.
2. The Jordan Creek Hydrologic Basin can be divided roughly into two separate topographical areas: (1) the Headwaters, located in higher elevations and higher gradient uplands punctuated with ranchlands along or near tributary streams; and (2) the Lower Jordan Creek Valley, a broad, gently sloping east to west then northwest valley of ranches through which Jordan Creek and portions of Jordan Creek tributaries meander to the Idaho/Oregon State Line. The upstream boundaries of the Lower Jordan Creek Valley include lower Jordan Creek, lower Lone Tree Creek, the extreme lower portions of Williams Creek, Big Boulder Creek, Flint Creek, and a small portion of Jordan Creek just upstream of the location where Flint Creek Road crosses Jordan Creek. The map attached as Attachment A depicts the boundaries of the Lower Jordan Creek Valley with a gray boundary line and gray cross-hatching.
3. Water rights bearing primarily senior priority dates authorize diversion of water from Jordan Creek and lower tributaries in the Lower Jordan Creek Valley for irrigation. For the most part, water rights authorizing diversion of water from streams in the Headwaters bear dates of priority later than the water rights in the Lower Jordan Creek Valley.
4. Gusman Livestock owns the irrigation water right with the second most-senior priority on Lower Jordan Creek. Gusman Livestock asserts that owners of ranches located upstream of the Gusman Livestock place of use are diverting Jordan Creek water pursuant to water rights bearing junior priority dates to the Gusman Livestock water right. As a result of these diversions, Gusman Livestock asserts it is being deprived of water to which it is entitled.
5. Holders of water rights authorizing diversion of water upstream from Gusman Livestock assert:
 - a. The water users have attempted to informally deliver water to Gusman Livestock when there is a shortage of water.
 - b. Measuring devices and controlling works on Jordan Creek and tributaries are deficient or nonexistent, and water cannot currently be measured and delivered to water rights in priority.
 - c. Water rights authorizing diversion of water from the Headwaters must be regulated in priority with the water rights authorizing diversion of Jordan Creek water in the Lower Jordan Creek Valley.
6. Tributaries located in the Headwaters derive water from high desert uplands and mountainous terrain surrounding the Jordan Creek Hydrologic Basin. Snow in the upper reaches of the basin melt early in the year, and many of the streams diminish to base flows or dry up after the spring runoff. These streams may or may not contribute water to the Lower Jordan Creek Valley during the summer when stream flows are low and the demand for water is high.

7. Currently, the Department has little knowledge of the contribution of Headwater tributary streams to the flows of Jordan Creek in the Lower Jordan Creek Valley during summertime base flows.

8. Without knowledge of the contribution of streams in the Headwaters to Lower Jordan Creek, there is no good reason to separate the Headwaters and the Lower Jordan Creek Valley into two separate water districts as some have suggested.

9. Joint monitoring and measurement by a watermaster, assisted by Department staff, is necessary to establish the hydraulic connectivity and the timing of connectivity between the Headwaters and Lower Jordan Creek Valley.

CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 et seq.

3. The Director is responsible for directing and controlling the distribution of water in accordance with the prior appropriation doctrine, as established by Idaho law, within water districts, to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-604 mandates that the Director “shall” form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation.

5. All the water rights claimed in the SRBA and within Basin 55, including the Jordan Creek Hydrologic Basin, have been decreed by the SRBA District Court.

6. Based upon the above statutory authorities, and the record in this proceeding, the Director should create a water district to administer and regulate water rights and protect senior priority water rights in the Jordan Creek Hydrologic Basin.

ORDER

IT IS HEREBY ORDERED:

1. Water District No. 55B is created to include all surface water rights in the Jordan Creek Hydrologic Basin in Basin 55 as shown in the map appended hereto as Attachment A.
2. Surface water rights for de minimis instream stockwater purposes are excluded from the water district and will not be regulated by the watermaster of Water District No. 55B.
3. The holders of water rights within Water District No. 55B shall meet in June 2022 at a date, time, and place to be announced by the Director to conduct its annual meeting to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.
4. The watermaster for Water District No. 55B shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
 - a. Measure, collect, and record the diversions authorized by water rights;
 - b. Administer and enforce water rights in priority; and
 - c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right).
5. The Director will issue separate orders requiring the installation of measuring devices and controlling works for water right diversions within Water District No. 55B. The Director anticipates a series of orders requiring the installation of measuring devices and controlling works focused initially on Lower Jordan Creek and extending up into the Headwaters in subsequent orders if justified by hydrologic analysis.
6. The holder of any water right who is seeking delivery of water by the watermaster must first install controlling works and a measuring device approved by the watermaster and the Department prior to delivery of water by the watermaster. The department may also require installation of controlling works and measuring devices on other points of diversion prior to regulation if the Department determines installation is necessary for delivery to the holder of a water right who is seeking delivery of water.

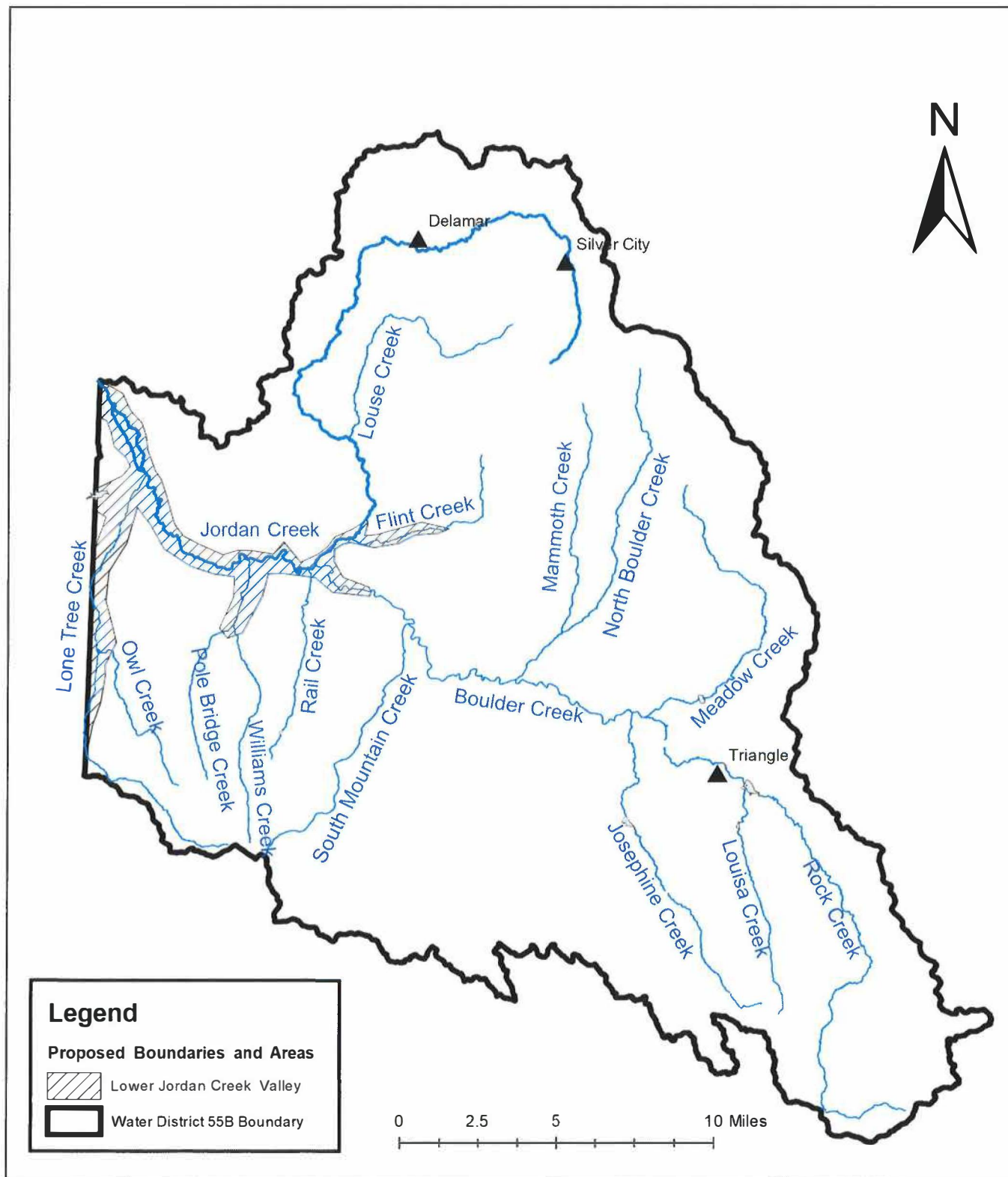
DATED this 9th day of May 2022.



Gary Spackman
Director

Attachment A

Water District 55B - Jordan Creek and Tributaries



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2022, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

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EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER ON RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is an **Order on Reconsideration** of the “final order” issued previously in this proceeding by the Idaho Department of Water Resources (“Department”) pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the Department may appeal the final order and all other orders issued in the matter to district court by filing a petition for judicial review in the district court of the county in which:

- (a) the hearing was held; or
- (b) the final agency action was taken; or
- (c) the aggrieved party resides or operates its principal place of business in Idaho; or
- (d) the real property or personal property that was the subject of the agency decision is located.

Section 67-5273, Idaho Code, provides the deadline for filing a petition for judicial review and states, in relevant part:

A petition for judicial review of a final order ... must be filed within twenty-eight (28) days of the service date of the final order, ... or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. A cross-petition for judicial review may be filed within fourteen (14) days after a party is served with a copy of the notice of the petition for judicial review.

Pursuant to section 67-5274, Idaho Code, the filing of a petition for judicial review does not itself stay the effectiveness or enforcement of the agency action.